KATHLEEN WALLMAN

WALLMAN CONSULTING, LLC

9332 RAMEY LANE

GREAT FALLS, VA 22066

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William Maher, Esq.
Chief, Wireless Competition Bureau
Federal Communications Commission
445 12th St., S.W.
Washington, DC 20554

RE: AT&T Petition for Declaratory Ruling, WC Docket No. 02-361 (Oct. 19, 2002) on behalf of Callipso Corporation

Dear Mr. Maher:

I write on behalf of Callipso Corporation, a leading provider of enhanced Voice over Internet Protocol ("VoIP") services, in connection with the Commission's pending decision on the AT&T Petition for Declaratory Ruling, WC Docket No. 02-361 (Oct. 19, 2002) ("AT&T Petition"). Specifically, we are concerned that a ruling on the AT&T Petition that imposes carrier access charges on origination or termination of VoIP – including "phone-to-phone" VoIP – will have a fatal effect on the development of VoIP and VoIP-enabled applications well beyond the immediately foreseeable impact of the petition.

Callipso urges the Commission to proceed as follows:

1. Do not rule on the AT&T petition now. Rule on it after developing the record in the forthcoming NPRM on VoIP.

2. Issue an interim ruling now that reinforces the Commission's five-year long forbearance approach by clarifying that access charges do not now apply to VoIP and will not apply until such time as the FCC affirmatively rules otherwise. Further, affirm that access charges may not be collected retroactively.

We develop below the following main arguments:

1. VoIP is a fast evolving platform. Old constructs like the "phone-to-phone" model suggested by the Stevens Report, and even the AT&T petition itself, do not accurately reflect the current scope of VoIP. For this reason, the issuance of "goalpost" or

"boundary" rulings – "no" to AT&T's petition and "yes" to FWD's petition, for example – ***will not*** provide clarity, because it will spur numerous additional clarifying petitions, ***but will*** stifle development of VoIP since the "phone-to-phone" model is Step One in the build out of desktop-to-desktop VoIP functionality.

2. The proponents of regulation have not made any persuasive arguments that VoIP should be regulated now, via an adverse ruling on the AT&T petition or otherwise.

3. The FCC should not be persuaded by the RBOCs' "parity" arguments to single out and regulate phone to phone competitive VoIP ("CvoIP") out of existence while incumbent VoIP ("IVoIP") providers develop and deploy their own business plans. See "RBOCs Entering VoIP Game" http://www.atlantic-acm.com/datalines/d112603.htm. Likewise, the FCC must act to put an end to the RBOCs; aggressive self-help measures designed to use their market power to kill CVoIP. Written evidence of this conduct has been provided recently to the Commission in the filings of UTEX Communications Corp. in the Commission's VoIP Forum, and by Level 3 Communications in its petition filed Dec. 23, 2003 (docket #03-266).

4. Before the FCC issues any decisions in the VoIP area, it should collect and develop a record on the full panoply of VoIP issues including intercarrier compensation. The arguments that VoIP must be regulated to advance public policy goals such as universal service, access for people with disabilities, E911, and affordable services for rural and insular communities are "red herrings" and can be accommodated. These arguments should not drive overreaction on the basis of an incomplete record as all of these goals can be achieved and protected in the context of a proceeding that looks comprehensively at VoIP issues.

EXPLANATION OF RECOMMENDED COURSE OF ACTION

While we think the prudent course is not to act now on AT&T's petition, in light of the pending NPRM and the need to develop the record, *if* the Commission concludes that it has a suitable basis for decision, then Callipso urges the Commission use the AT&T petition as a vehicle to issue a declaratory ruling that "*all* . . . phone-to-phone IP and VoIP telephony services are exempt from access charges *unless and until the FCC adopts regulations that prospectively provide otherwise*."[1] AT&T Petition, at 33 (emphasis added).

If the Commission decides now to act more comprehensively on VoIP regulation through the AT&T Petition, it should hold that access charges do not apply to any form of VoIP. Regulation of any form of VoIP is neither necessary nor in the public interest. Callipso urges the Commission to resist arguments that seek to justify subjecting phone-to-phone ("PTP") VoIP

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[1] Although AT&T concedes in its petition that it currently elects to pay access charges for origination of some VoIP calls, the Commission, as set forth below, has never authorized access charges on VoIP for *either* termination or origination. Accordingly, AT&T appropriately seeks a declaratory ruling that affirms the *status quo* that at *all* forms of VoIP are exempt from all access charges.

services to regulations not applicable to other VoIP services.[2] PTP VoIP may *mimic* ordinary telecommunications service for user convenience, but it is not a Title II "telecommunications" service – it is merely one application among a vast panoply of data services that have always been – and should continue to be – free from telecommunications regulation.

Nonetheless, should the Commission decide now to regulate VoIP, either by type of provider or subset of service, it should act cautiously to avoid the high risk of unintended but potentially fatal injury to emerging providers of these incipient services. Specifically, the Commission should confirm that no local exchange carrier may demand payment of switched access charges for the origination or termination of VoIP calls completed prior to the Commission's ruling. In light of the Commission's record of consistent forbearance on the application of access charges to VoIP, fundamental fairness demands this result. Moreover, the Commission should determine to phase-in any prospective application of regulation to VoIP over a period of time sufficient to allow market participants to adjust responsibly.

We also urge that the "goal post" approach that the Commission may be contemplating will not deliver clarity to the market because there are so many different configurations of VoIP in the marketplace. Competitive VoIP providers will be constrained to distinguish their own offerings from AT&T's, if the Commission rules negatively, in the marketplace. If VoIP providers' commercial partners are not persuaded by these distinctions, or if the RBOCs continue to assert broad applicability of the access charge regime, a new parade of petitions for declaratory rulings will arrive at the Commission. The only way to achieve real, helpful clarity is through a comprehensive examination of VoIP.

SUPPORTING ARGUMENTS

I. CALLIPSO EXEMPLIFIES WHY COMPETITIVE VOIP OFFERINGS, INCLUDING PTP, MUST BE ALLOWED TO CONTINUE TO EVOLVE FREE FROM UNNECESSARY REGULATION

Callipso presently markets primarily to telecommunications companies, such as long-distance carriers, or to channel partners such as long-distance resellers, prepaid calling card providers and CLECs, who in turn incorporate Callipso's services as part of their product offerings. The Company also markets services that integrate its VoIP product into hosted and end-user defined computer-driven applications. Callipso's patent pending "ExpressConferencer" product, for example, integrates PC-based applications with web-based setup and billing of VoIP transported conference calls. Future VoIP-enabled applications will infuse consumer devices

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[2] Level 3 recently filed a petition expressly seeking forbearance with respect to VoIP services other than PTP. Level 3 clarified, however, that it supports AT&T's petition to affirm the access charge exemption for PTP VoIP as well, explaining that it limited the scope of its request only to avoid duplication of the issues raised in the AT&T petition. *See* Petition for Forbearance Under 47 U.S.C. § 160(c), Docket No. 03-266 (Dec. 23, 2003), at 7-8, fn. 20. Accordingly, Callipso believes that the two petitions should be regarded as complementary, as Level 3 intended, and that the Commission therefore can and should include all forms of VoIP in any order granting forbearance from access charges.

such as PDAs and other user-defined communications products with voice functionality and extend the versatility and power of IP networks to enterprise customers and individual users.

At present, many VoIP providers deliver services, such as PTP VoIP, which are functionally similar to a regular circuit switched call. But VoIP will evolve once the backbone is in place and gateway or CPE devices to exploit VoIP and managed IP networks are widely distributed. VoIP then will become a "component" of integrated services that have richer content, such as video phones, voice/data combinations for distance learning, or games, and voice-enabled Internet marketing. There is a danger in imposing regulatory burdens on VoIP calls at this stage because it is today impossible for the LECs to tell which calls are isolated PTP VoIP and which are enhanced with companion video, data or other interactive content. Application of access charges, now, will inhibit the introduction of enhanced services and deter technological initiatives presently supported by VoIP. Callipso is employing or developing all these services. Its ability to attract capital, sustain existing debt, and grow to provide new services will be destroyed if it is subject to the legacy switched access charge regime.

In short, VoIP is a fast evolving platform. Allowing emerging companies to continue to provide PTP VoIP free of unnecessary regulation will be critical to the continuing success of this evolution.[3] The AT&T petition is over a year old, and the Stevens Report, which supplies the "phone-to-phone" classification that some argue would support ruling against the AT&T petition, is over five years old.[4] These old constructs do not represent what is actually and currently happening in VoIP; a Commission decision to establish "boundaries" with an adverse ruling on AT&T would do enormous damage to the continuing evolution of VoIP.

II. PROPONENTS OF VOIP REGULATION HAVE FAILED TO DEMONSTRATE THAT ANY FORM OF VOIP REGULATION IS NECESSARY OR APPROPRIATE AT THIS TIME

In his opening comments to the VoIP Forum held on December 1, 2003, Chairman Powell stressed that those who would impose new regulatory burdens on VoIP services bear the burden of establishing that there is a compelling need for such regulation and that imposing such burdens would not violate the Commission's foundational regulatory principle: "First, do no harm." If the Commission finds this burden has not been met, it *must* forbear from regulation.

Specifically, "The Commission *shall* forbear from applying any regulation . . . to a telecommunications service" where the Commission determines that

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[3] For example, MCI, one of the early challengers to AT&T's total dominance of the long distance market, began almost exactly as are VoIP providers such as Callipso: obtaining local circuits, then connecting to a transport network to deliver traffic to a distant location. Despite the protests of incumbents then and claims of alarm in favor of immediately "killing" the new entrant's configuration, MCI eventually came under a regulatory regime that preserved its ability to provide services at a competitive price.

[4] Universal Service Report to Congress, April 10, 1998 (the so-called "Stevens Report").

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
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> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
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> (3) forbearance from applying such provision or regulation is consistent with the public interest

47 U.S.C. § 160(a) (emphasis added). The Commission has recognized that its forbearance obligation is an "integral part" of the Telecommunication Act's "pro-competitive, de-regulatory" framework designed to "make available to all Americans advance telecommunications and information technologies and services."[5]

Consistent with its Congressional mandate, in the 1998 Stevens Report, the Commission declined to regulate VoIP services because, in light of the evolving nature of IP-based services, the Commission found that the record at that time did not demonstrate that any form of VoIP regulation was necessary or appropriate.[6] *It still doesn't.* The record the commission will need to properly assess whether and how to regulate VoIP and compensate carriers for delivering such traffic is only now beginning to be assembled, and remains preliminary at best. Considering the complexity of these relationships, the prudent course is to further develop the VoIP-specific record, and evaluate the interrelationships, before making regulatory decisions.

There is also no showing that access charges are necessary to properly compensate RBOCs for the origination of VoIP traffic. RBOCs generally receive reciprocal compensation from CLECs for originating VoIP traffic. By statute, reciprocal compensation is negotiated between the parties and is to be "a reasonable approximation of the additional costs of terminating such calls." *See* 47 U.S.C. § 252(d)(2)(A)(ii). Accordingly, there is no basis to conclude that RBOCs are currently under-compensated for terminating VoIP calls to local CLEC numbers or that additional regulation is necessary to make such charges "just and reasonable." 47 U.S.C. § 160(a)(1). Indeed, applying over-market switched access charges to such traffic would only grant an uneconomic and undeserved windfall to the RBOCs at the expense of the public interest in competition, including from the emerging VoIP providers. The FCC should not be persuaded by the RBOCs' "parity" arguments to regulate competitive VoIP ("CvoIP") out

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[5] Order, *Petition for Forbearance of Iowa Telecommunications, Services, Inc. d/b/a/ Iowa Telecom Pursuant to 47 U.S.C. § 160(c) etc.*, 17 FCC Rcd. 24319, 2421 (¶ 6) (2002).

[6] *See* Stevens Report. ¶ 89 (noting that phone-to-phone IP telephony was similar to telecommunications, but holding that it would not be appropriate to regulate it as such absent a fuller record, explaining that "[W]e recognize the need, when dealing with emerging services and technologies in environments as dynamic as today's Internet and telecommunications markets, to have as complete information as possible").

of existence while incumbent VoIP ("IVoIP") providers develop and deploy their own business plans. See "RBOCs Entering VoIP Game" http://www.atlantic-acm.com/datalines/d112603.htm.

Callipso believes that if the Commission orders immediate imposition of access charges on PTP VoIP providers like Callipso, it would disrupt Callipso's current carrier access agreements because these agreements were negotiated with the understanding that access charges do not apply and cannot be economically maintained if such charges were now held to be applicable. This would be disruptive to Callipso's service to tens of thousands of consumers who rely upon Callipso for their long distance service. A similar effect will occur if the Commission does not clarify that there will be no "retroactive" application of regulatory charges to VoIP, as companies like Callipso cannot endure if they are at risk of potentially huge but indeterminate liability to RBOCs based on charges never specifically authorized by the Commission.[7]

In short, the Commission should not be persuaded by the RBOCs' "sky is falling" arguments into applying the current access charge regime to emerging VoIP providers. A careful examination of a fully developed record reveals that application of the current access charge regime would wildly overcompensate the RBOCs – and would kill competitive VoIP, smoothing the way for the RBOCs' subsequent introduction of their own VoIP offerings without substantial competition.[8]

III. THE COMMISSION SHOULD ACT TO PREVENT ILLEGAL SELF-HELP BY THE RBOCS AND RESTORE THE STATUS QUO

In the Stevens Report, the Commission determined that no form of VoIP, including phone-to-phone VoIP, would be subject to access charges or other telecommunications regulation until the Commission had an opportunity to review particular offerings on a complete record. While the Commission is free to make whatever ruling its process duly may produce,

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[7] The Commission should not adopt any ruling that supports retroactive collection of access charges. Callipso believes that such a ruling would be a rule change and would not survive legal challenge. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."). SBC's *ex parte* arguments that VoIP has been subject to access charges all along is disingenuous given that: (1) neither SBC nor any other party challenged the Stevens Report or any of the Commission's subsequent statements recognizing that VoIP is exempt from access charges; and (2) for years, the RBOCs never claimed entitlement to access charges for VoIP traffic, clearly demonstrating that they did not believe that the law permitted them to collect such fees.

[8] We hope that the FCC will lay serious emphasis on this latter point. The evolution of IP as an integrated platform for numerous and diverse services is inevitable. The RBOCs will be required by market forces to incorporate the use of this platform into their business plans. It would be wrong and ironic to adopt rules that would kill competitive VoIP offerings to clear the way for RBOC dominance of a new mode of delivering service.

and conceivably *may* impose access charges on some forms of IP telephony but not others, *it has not done so as of yet.* Thus, currently there is no legal basis to impose access charges on *any* form of VoIP.

In recent months, however, RBOCs have begun to demand that CLECs carrying VoIP traffic pay access charges or they refuse to carry the traffic. Although the specifics vary from case to case, in general the RBOCs advise CLECs that they believe that some of the traffic carried over CLEC circuits and originating from or delivered to RBOC customers is inter-LATA VoIP traffic. As such, they assert that access charges are due and owing retroactively and prospectively. Rarely if ever do they provide any billing documentation or support for the classification of the calls or the amounts demanded. On notice at that point, however, CLECs are constrained to respond because the RBOCs will terminate service to them, or setoff reciprocal compensation payments, if the CLECs do not capitulate and "pay-up" as RBOCs demand.

The impact of these actions on Callipso has been severe. Callipso has been forced to abandon some markets entirely. In other markets, it has no choice other than to pay CLECs for local lines (via PRI agreements) at rates many multiples greater than prior to the RBOC self-help measures. Other VoIP providers have suffered similar consequences as a result of the RBOC's illegal self-help measures.[9]

The resultant chaos in the marketplace is having many effects upon the nascent VoIP industry; none are positive and all worsening on a daily basis. The RBOC charges, and the uncertainty of current regulatory treatment, also deter investors when emerging facilities-based providers, like Callipso, otherwise are positioned to become larger and more capable competition.

It is the Commission's role, not that of any group of dominant market actors, to decide if, when and in what direction policy concerning VoIP should change. However, absent Commission action, the RBOCs will continue to use their market power to dictate the rules that apply to VoIP services without regard to the Commission's long-standing forbearance policies. Moreover, unless prevented, the RBOCs' illegal actions will force many emerging VoIP providers out of business, leaving the incumbents free to introduce their own VoIP products without substantial competition. The Commission must act now to contain the disorder in the market and prevent further anticompetitive RBOC conduct.

IV. PTP VoIP PROVIDERS SHOULD NOT BE SINGLED OUT FOR REGULATION

In the Stevens Report, at ¶ 88, the Commission tentatively concluded that PTP VoIP services had some characteristics of "telecommunications" rather than "information services." The Commission determined, however, to forbear from regulating any one form of VoIP at that

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[9] Written evidence of such egregious conduct has been provided recently to the Commission in the filings of UTEX Communications Corp. in the Commission's VoIP Forum, and by Level 3 Communications in its petition filed Dec. 23, 2003 (docket #03-266).

time. Callipso submits that there is no principled reason to regulate PTP VoIP differently from other forms of VoIP services. In fact, there are very good reasons to recognize that VoIP when provided over private, managed networks – as operated by Callipso – should be encouraged by continued regulatory forbearance.

With the exception of cable-based voice service providers, all VoIP providers are wholly dependent on incumbent carriers' local loop facilities for ingress and egress into and out of private enhanced service networks. Where IP conversion occurs at the user premises, through either a computer or specialized CPE, voice information is transmitted via the local loop to either an ISP or a private IP network. Where the end-user device is a telephone, the same voice transmission flows through *precisely the same local telecommunications lines* to the same ISP or IP network. The only difference between PTP and other VoIP services is *where* the IP conversion takes place, whether at the customer's premises (the so-called "edge" of the network) or at the gateway at the center of the network. Otherwise, the transport of the VoIP call is functionally identical regardless of whether the conversion occurs on premises or at a gateway.

All forms of VoIP services facilitate IP-protocol voice communications in real time and transport sound, once converted into IP packets, to a speaker at the receiving end that reproduces the audio character of the original spoken voice. In computer-to-phone, computer-to-computer and phone-to-computer applications, one or both of the users must have a computer to receive or send VoIP transmissions. In PTP applications, by contrast, the VoIP provider or a telecommunications partner makes IP voice services available to ordinary phone users by performing an additional step, at the gateway to the provider's network, that converts analog-to-IP packets *and back again*. The use of this *additional* step to make IP services more broadly available does not change the "information service" characteristics of a VoIP offering and thus is not, in itself, a basis for regulation.

Conversely, moving IP gateway computers to the edges of the communications network does not provide any additional or enhanced functionality to VoIP users and is not a basis to apply regulatory preferences to edge-based IP services over PTP services. Indeed, bringing IP all the way to the edge of the network not only limits use of the IP services on one or both ends of the communication to computer users or those with special CPE, it may also eliminate critical consumer and public protection mechanisms currently implemented through the PSTN, such as 911, CALEA compliance capability, and disability access. On the other hand, by allowing the local transmission of an IP communication to occur on the PSTN, PTP providers can provide the same enhanced calling functionality that other VoIP providers offer – without interfering with existing consumer protection and law enforcement mechanisms implemented through the local phone system.

The Stevens Report established an initial classification of forms of VoIP, such as phone-to-phone or computer-to-phone, and suggested the regulatory outcome could differ depending on the classification. This construct has proven obsolete as the “phone-to-phone” model suggested by the Stevens Report does not accurately reflect current operation of VoIP.[10] In addition, any

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[10] Further, while one can conceptually distinguish between different "layers" within a communications network, and conceptually favor innovation at the "application" layer in distinction from the

regulation directed at PTP VoIP which did not apply to computer-to-phone or phone-to-computer VoIP would be impractical if not impossible to implement.

- First, there is no way for companies originating or terminating VoIP traffic on the PSTN to determine whether the party on the other end is using a computer or a telephone, so they would not be able to distinguish between "regulated" and "unregulated" VoIP for purposes of assessing appropriate fees.

- Second, regulation aimed at PTP VoIP would encourage VoIP providers to avoid the burdens imposed on PTP providers by altering their product offerings and network architecture so that they provide only analog-to-IP or IP-to-analog conversion, but not both – thus artificially limiting the scope and availability of their services with no benefit to the public.

Focusing regulation on PTP while exempting other forms of VoIP providers thus would discriminate against the form of VoIP most widely available to the American public and would diminish competition. It is a fact that PTP is currently the *only* form of VoIP services available to Americans who can't afford or operate a computer or other specialized equipment in their home, such as the elderly, immigrants, and other low-and fixed- income earners. As a result, any regulation of PTP would have a disparate impact on these vulnerable classes of Americans. Regulating PTP differently than other forms of VoIP thus would directly contravene the Commission's Universal Service objectives and Section 706 by unjustifiably discouraging the provision and deployment of VoIP services to those who most need low-cost alternatives to traditional long distance calling.

VI. CONCLUSION

Callipso is prepared to serve as a resource to the Commission in the development of a sound policy structure for VoIP. The Commission's concerns about universal service, law enforcement and emergency services can be accommodated, and we are prepared to work hard to do so. But we urge the Commission in the short term not to adopt a "goal post" approach that will moot some of the most important structural issues that the Commission should address in the notice of proposed rulemaking. We look forward to working with the Commission in that context.

"transport" or "physical" layer, in practice there are various models of VoIP, in certain of which VoIP services providers are necessarily participating in several "layers". Certain innovative VoIP applications (not incorporated directly into equipment) cannot be brought to market by innovators without also providing the end-user enterprise customers circuit facilities to the customer premises (acquired from common carriers). The VoIP application innovator needs not only fair access to the physical circuits needed by the end-user to access the innovative application, the innovator needs to be able to acquire from carriers and bundle into his VoIP product offering those network circuits and facilities which are needed to offer enterprise customers an end-to-end service. In practice, it is difficult to separate VoIP transport from application. Action directed against VoIP actors in the "transport" layer can adversely affect the development and rollout of VoIP "applications."

Very truly yours,

//signed//

Kathleen Wallman

Copies to Messrs Libertelli, Gonzalez, Brill, Mss. Zaina, Rosenworcel, Jackson, Preiss, Mr. Carlisle, Dr. Pepper,